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PRIVATE PROPERTY, THE TAKINGS CLAUSE AND THE PURSUIT OF MARKET GAIN

by

CHARLES H. CLARKE*

INTRODUCTION

The Basic Issue - Two Models Of The Takings Clause

Essentially, the regulatory takings issue is a controversy over how much private property and the public should get from each other. More for one is likely to mean less for the other when the parties cannot agree upon fair shares. Private property may be apprehensive that the public, through its regulatory authority, the state, will try to get as much from private property as the state can get, leaving private property with just enough to get along. The public, however, may be equally apprehensive that always letting a laissez faire marketplace allocate benefits will leave the public with just enough to get along, while private property enjoys the rest.

The national experience before the Great Depression, and especially during it, shows that a constitutional regime of laissez faire can inflict catastrophic losses upon the public. Public apprehension of this system is well-founded. The national experience with the modern welfare state, however, especially during the last decade, shows that private property has little to fear from state power to regulate private property to the point of a fair return.

This vast state regulatory power seems to work well when it is primarily held in reserve. Ordinarily, the legislature does let the market allocate benefits. State regulatory intervention occurs primarily when the market is unfair or cannot do an adequate job.

Consequently, this Article proposes a fair return model for the takings clause. This conception of the clause has been an operating principle of welfare capitalism for decades. The Article rejects the model of laissez faire capitalism that once dominated the landscape of the nation's constitutional system and may come back again.

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A Fair Return Model Of The Takings Clause

A fair return model of the takings clause¹ gives property owners a choice when there is a known possibility, however slight or great, that what they want to do with their property in the pursuit of market gain may bring loss to the public. The choice is to forego the gain and find gain elsewhere or to proceed and risk loss of investment principal from regulation to prevent loss to the public. Ordinarily, public loss is simply the disappearance or reduction of a public benefit that pursuit of market gain might foreclose.²

A landowner will almost always know whether a land use has the potential to result in public loss, although it may appear that embarking upon the use involves little or no risk to the public. This foreknowledge of the potential for public loss gives him adequate notice of the possibility of state regulation to prevent it. Occasionally, but rarely, knowledge of potential loss to the public from a land use will not appear until after the landowner has committed his investment principal. When this does occur, however, the survival choice between loss of investment principal and loss of a public good should belong to the legislature rather than the Supreme Court.

The balancing scales of the Supreme Court are incapable of weighing the conflicting values in such a case.³ Letting the legislature make the hard survival choice, however, presents no risk to a fair return upon capital overall. It simply lets the representatives of the people decide which values are more important and should be saved when something must be lost.

The Takings Clause And A Never-Ending Controversy

The takings clause has one certainty. It elicits sharp disagreement easily. A look at the periodical literature about the takings clause reveals more work than might be read in a lifetime. It is full of disagreement,⁴ Further, most of it developed long after the Supreme Court had oiled the levers of power for the

¹ The applicable language of the fifth amendment to the United States Constitution provides "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The due process clause of the fourteenth amendment requires the states to observe the right that is secured by the takings clause; *Chicago B. & O.R.R. v. City of Chicago* 166 U.S. 226, 239-41 (1897). The relevant language of the fourteenth amendment to the United States Constitution provides in part: "[N]or shall any state deprive any person of life, liberty or property, without due process of law. . ." U.S. CONST. amend XIV, § 1.

² *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974); *Berman v. Parker*, 348 U.S. 26, 32-33 (1954).

³ See *supra* text accompanying notes 30-101 and 153-166.

⁴ <http://ideaexchange.uakron.edu/akronlawreview/vol25/iss1/1>
See *supra* text accompanying notes 3-21.

regulatory welfare state and was busily engaged in other matters.⁵

Prestigious authors have disagreed over the clause and its great cases. Professor Frank Michelman and Professor Lawrence Berger, for example, think that severe regulatory loss of property to prevent a public loss from its use is unacceptable when the risk of public loss is a mere possibility at the outset.⁶ Thus, they disapprove of *Hadachek v. Sebastian*⁷ which upheld an uncompensated regulatory shutdown of a brick factory because it foreclosed nearby residential and related community development in Los Angeles, California.⁸ Professor Michelman also disagrees with *Miller v. Schoene*⁹ which permitted Virginia to destroy beautiful red cedar trees without compensation because they became infected with a rust disease that threatened apple orchards and the state's apple industry with loss.¹⁰

These two authors, then, appear to believe that the results of the marketplace in a situation like *Hadachek* will usually be fairer and better than uncompensated legislative proscription to prevent loss to the public from a land use. Further, Professor Michelman holds a similar view about what nature handed out in *Schoene*.¹¹ Although the two authors did not advocate laissez faire, they did view the police power to regulate landowners from the perspective of culpable, foreseeable loss that puts the landowner at fault for acting.¹² This

⁵ The Supreme Court noted some of the commentary and controversy about the takings clause, including law review articles by Professor Frank Michelman, Professor Lawrence Berger and Professor Joseph Sax, in *San Diego Gas & Electric Co. v. City of San Diego* 450 U.S. 621, 649-50 n.15 (1981), (dissenting opinion of Justice Brennan which three other judges joined; *Id.* at 636). See *supra* text accompanying notes 3-21.

⁶ Michelman, *Property, Utility, and Fairness; Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV L. REV. 1165, 1198-99, 1236-39, 1242-44 (1967); Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165, 173-74, 195-96, 209-10 (1974). Professor Michelman approves such a regulatory loss, however, in situations where the regulated property owner should be able to understand that he would be better off in the long run accepting the loss; Michelman at 1221-23; cf. Berger at 183-85.

⁷ 239 U.S. 394 (1915).

⁸ *Id.* at 410. Michelman, *supra* note 6, at 1198-99, 1237-39, 1242-44; Berger *supra* note 6, at 173-74, 195-96, 209-10.

⁹ 276 U.S. 272 (1928).

¹⁰ *Id.* at 279. Michelman, *supra* note one p. 4 at 1198-99. Professor Michelman's position, which is largely utilitarian, does not require state compensation for regulation that proscribes obvious wrongdoers and requires them to restore what they have taken from others. *Id.* at 1237-41. Failure to provide compensation for the proscription of other property owners, however is likely to elicit subsequent avoidance reactions from them that will impose costs upon the community. *Id.* at 1214. To avoid these costs, then, the state should compensate the regulated property owners unless compensation would cost the community more than absorbing the costs of the avoidance reaction of the property owners. *Id.* at 1215; cf. Berger, at 182-83. Professor Michelman believes that compensation is clearly required in *Hadachek v. Sebastian*; Michelman, *supra* note 6, at 1237, 1241-45. He also thinks that *Miller v. Schoene* is a similar case. *Id.* at 1198-99.

¹¹ Michelman, *supra* note 6, at 1198-99.

¹² Michelman, *supra* note 6, at 1236-39; Berger, *supra* note 6 at 174.

conception of the police power might make severe land regulation primarily a scourge for traditional criminals and tortfeasors although the market itself can occasionally inflict sizeable losses upon the public.

Professor Richard Epstein, however, does advocate a constitutional regime of laissez faire.¹³ He would also constitutionally limit a substantial part of the police power to what the common law of nuisance would let the state suppress.¹⁴ Consequently, he approves *Hadachek*,¹⁵ but seriously doubts that *Schoene* satisfies this standard.¹⁶ Further, Professor Epstein disagrees with *Village of Euclid v. Ambler Realty Company*¹⁷ which upheld zoning in place of the helter-skelter system of land use development that the common law of nuisance bestowed upon the community.¹⁸ But he does approve *Pennsylvania Coal Company v. Mahon*¹⁹ which held that the coal industry had a constitutional right to destroy inhabited communities in the anthracite region of Pennsylvania in conducting mining operations, after having bought and paid for the property right to do so.²⁰

Merely listing all relevant articles and titles about the takings clause would require several pages. Some authors, however, do prefer a construction of the clause that would accommodate the needs of the regulatory welfare state. Professor Joseph Sax, for example, has a conception of the police power and the takings clause that would let the legislature make the hard choices that the inevitable conflict between property interests and other interests require.²¹

Thus, the takings clause and its four great cases, *Schoene*, *Hadachek*, *Euclid* and *Mahon* have brought the nation a disarray of academic opinion and some enduring constitutional law. The disarray of academic opinion is ironic. Much of it seems to propose the solutions of the marketplace rather than the legislature for some serious problems. Yet the court that decided the four great cases had the philosophic outlook of Justice George Sutherland, architect, master builder and guardian of a constitutional regime of laissez faire that only the Great Depression

¹³ Epstein, *Takings: Private Property And The Power Of Eminent Domain* (1985); see Grey, "The Malthusian Constitution", 41 U. MIAMI L. REV. 21 (1986); Tribe, *American Constitutional Law*, p. 606-07, n.6 (1988).

¹⁴ Epstein, *supra* note 13, at 112-21.

¹⁵ *Id.* at 118-21.

¹⁶ *Id.* at 113-14, 118.

¹⁷ 272 U.S. 365 (1926).

¹⁸ *Id.* at 394-97; Epstein, *supra* note 13, at 131-34.

¹⁹ 260 U.S. 393 (1922).

²⁰ *Id.* at 414. Epstein, *supra* note 13, at 63-64. See also Epstein, *Takings: Descent And Resurrection*, 1987 SUP. CT. REV. 1, 5-23 (1987).

²¹ See Sax, *Takings, Private Property And Public Rights*, 81 YALE L.J. 149, 163-69, 176 (1971); *Takings And The Police Power*, 1964 YALE L.J. 36, 49, 63, 67, (1964).

and New Deal, with great difficulty, managed to bring to an end.²²

This most conservative Supreme Court, in other words, has some conservative critics who think that the Court gave away too much private property to the police power. In a sense, the critics are right. This Court was quite ready to permit sacrifice of property interests when the sacrifice was necessary to accommodate its conception of a limited police power. So, the Court upheld *Hadachek* and *Euclid* to allow more amenable living conditions in modern urban industrial areas than the common law of nuisance would permit.²³ But this Court drew the line at *Mahon* because it thought that the state in *Mahon* was giving away private property on an enormous scale to provide the people of anthracite coal communities a place to live.²⁴

Still, a true believer in *laissez faire* might well have some uneasiness with the Court's system of *laissez faire*. It seemed to have a few uncomfortable legislative distinctions,²⁵ and its minor lapses into liberalism authorized severe regulatory destruction of property. In fact, all that had to happen was for *Mahon* to come out the other way²⁶ and the legislature would have a free hand to govern the marketplace.²⁷

As matters happened, after the legislature did get a free hand to govern the marketplace, *Mahon* did come out the other way. But the irony of the great cases of the takings clause persisted, nevertheless. *Mahon* was barely discarded in a 5/4 decision in which the four dissenting judges seemed to prefer some constitutional role for the law of the marketplace.

Moreover, the great precedents of the takings clause are capable of doing

²² Paschal, *Mr. Justice Sutherland, A Man Against The State*, 236-37, 244-45 (1951). Dunham and Kurkland, *Mr. Justice*, 203 (1964). Justice Sutherland wrote the opinion of the Court in *Adkins v. Children's Hospital*, 261 U.S. 525, 559 (1923) (holding a minimum wage law for women unconstitutional), overruled in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937). He wrote the plurality opinion in *Carter v. Carter Coal Co.*, 298 U.S. 238, 278, 307-10 (1936) (holding that congress' power to regulate commerce does not extend to labor relations in the coal industry), overruled in *United States v. Darby*, 312 U.S. 100, 123 (1941). Justice Sutherland also wrote the dissenting opinion for four justices in *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 448 (1934) which upheld state mortgage moratorium legislation during the Great Depression. Further, see *supra* text accompanying notes 129-142.

Justice Sutherland was appointed to the Court in 1922 after *Hadachek v. Sebastian* 239 U.S. 394 (1915). See 260 U.S. at iii. He participated in *Pennsylvania Coal Co. v. Mahon* 260 U.S. 393 (1922), *Miller v. Schoene* 276 U.S. 272 (1928), and he wrote the opinion of the court in *Village of Euclid v. Ambler Realty Co.* 272 U.S. 365, 379 (1926). *Id.* at iii.

²³ See *supra* text accompanying notes 45-82.

²⁴ See *supra* text accompanying notes 78-83.

²⁵ See *supra* text accompanying notes 126-134.

²⁶ *Keystone Bituminous Coal Assn. v. De Benedictis* 480 U.S. 470 (1987); See *supra* text accompanying notes 93-120.

²⁷ *Id.* at 507; See *supra* text accompanying notes 214-241.

more for the regulatory welfare state than letting it govern the marketplace. All that one has to do is look at *Miller v. Schoene*,²⁸ the cedar rust case, through the magnifying glass of the regulatory welfare state, and it might permit the legislature to prescribe regulatory loss of a private multi-million dollar dam to save the snail darter or a more valuable, private old-growth forest to save the northern spotted owl.²⁹ These results might be disquieting to some conservatives, even if they were well-established.

This panorama of intellectual challenge and controversy happened to be entirely academic when the Supreme Court observed the divergence of viewpoint among legal scholars, en passant, in a footnote, some time ago.³⁰ But the controversy has not remained academic. A new and different Supreme Court may be thinking about bringing back freedom of contract as a constitutional right,³¹ and a laissez faire construction of the takings clause would facilitate this objective.³²

Consequently, the fundamental disagreement about the great precedents of the takings clause may inform the decision in what may be the most important controversial controversy of the century. The modern American welfare state may soon be fighting for its life in the Supreme Court, itself, where a liberal legislature cannot save it. Its continued existence may depend upon the judgment of five or six Supreme Court judges whose philosophic outlook will likely run in the opposite direction.

This Article will discuss these matters approximately in the order in which they have been set forth. The great cases of the takings clause is the place to begin. They will not be taken up chronologically. *Miller v. Schoene*³³ will be presented first.

*Miller v. Schoene*³⁴ - The Cedar Rust Case

In *Miller v. Schoene*,³⁵ red cedar trees were the host plant of a rust disease that was harmless to the host, but fatal to any apple orchards that happened to be

²⁸ 276 U.S. 272 (1928).

²⁹ See *supra* text accompanying notes 153-166.

³⁰ *San Diego Gas & Electric Company v. City of San Diego*, 450 U.S. 621, 650-51 (1981) (dissenting opinion of Justice Brennan which three other judges joined; *Id.* at 636). See *supra* note 5, and text accompanying notes 3-5.

³¹ See *supra* text accompanying notes 212-243.

³² *Id.*

³³ 276 U.S. 272 (1928).

³⁴ *Id.*

³⁵ *Id.*

nearby.³⁶ To protect its apple industry from loss, Virginia authorized the uncompensated destruction of the cedar trees when they were dangerously close to an apple orchard.³⁷ The Supreme Court upheld the statute when it was challenged by an owner of red cedar trees.

The Court's explanation for its unanimous decision was a model of clarity and simplicity. After observing that the state was confronted with the choice of preserving one class of property or another class, the Court said: "When forced to such a choice, the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public."³⁸

But counsel for the owner of the cedar trees had offered the Court a different choice. He proposed a rule that would have compelled the state to let the loss lie where it would have fallen or to compensate the owner of the cedar trees for the loss of his trees.³⁹ The choice open to the state under this rule would have been to absorb the smaller of two losses to the state's interests.

Thus, counsel for the owner of the cedar trees explained that the owner was not at fault or responsible for their harmful condition⁴⁰ and, consequently, that fundamental fairness should not permit the state to prevent the loss of nearby apple orchards by causing the loss of his trees unless, of course, the state wanted to buy them.⁴¹ The loss of the apple orchards, unfair as it might be, should remain where it would fall unless the state paid compensation for diverting it to him. Thus the rule and rationale proposed by counsel of the owner of the cedar trees were as clear as the work product of the Court.

In essential agreement with the argument of counsel, Professor Michelman would treat the possible loss of the apple orchards as though the destructive agent had fallen out of the sky.⁴² But loss that falls out of the sky is not the same as loss that has a property source. When loss falls out of the sky, a sacrifice of

³⁶ *Id.* at 278.

³⁷ *Id.* at 277-78.

³⁸ *Id.* at 279.

³⁹ *Id.* at 274-75 (argument for plaintiff in error).

⁴⁰ *Id.* at 274. The Court said that the state's power to destroy the red cedar trees did not depend upon whether they were a nuisance at common law or could be declared a nuisance by statute; *Id.* at 280.

⁴¹ *Id.* at 274 (argument for plaintiff in error). Counsel also argued that destruction of the red cedar trees was a taking of property for a private purpose rather than a public purpose and, therefore, would be unconstitutional even if the state provided compensation for the trees; *Id.* at 274-75.

⁴² Professor Michelman says that *Miller v. Schoene* is not essentially different from the hypothetical situation "in which the apple pest spent its whole life in the apple trees but could be exterminated only by some arcane components, to furnish which the cedar stands were condemned without compensation." See Michelman *supra* note 6, at 1198-99. The cedar trees, in the hypothetical situation, however, are not the source of the loss of the apple trees, nor would they be the source if the loss fell down from the sky.

property that is the source of a loss is not available to prevent loss of property that would be the natural recipient of loss from the source.

Miller v. Schoene, however, is an example of the rare situation where the risk of loss remains unknown until the loss becomes imminent and makes some kind of loss unavoidable. In this situation, it is irrelevant, beforehand, to property owners as a group whether the loss falls upon source property or recipient property. The risk of being a source is the same as the risk of being a recipient. Therefore, it seems sensible for the state to let the loss fall where it will have the least harmful fallout on the public, which is what *Miller v. Schoene* did.

The situation would be slightly different if the world's most valuable and privately owned cyclotron, to the complete surprise of everyone, suddenly threatened to kill off large populations of birds. Under these circumstances, private property would not be the recipient of any loss. Further, directing the loss to private property, namely, the cyclotron, would impose a sacrifice upon private property that it would avoid if the loss were to remain where events would place it without anyone's fault.

Still a constitutional rule that would compel the state to leave this loss from property where it would fall or to pay full compensation for the regulatory loss to prevent it might impose too much hardship upon the ordinary citizen, whether he or she is called the general taxpayer, the public or simply labor. Loss from private property, regulatory loss to private property to prevent it and loss from paying compensation to prevent regulatory loss all arise out of the risks of living close together in a community where private property, labor and environment are mutually interdependent. These losses arise from the operations of the whole economic life-support system. Therefore, the state should have the power to allocate these losses among the parts of the system in a way that will result in the least misery.⁴³

A tax increase to pay compensation for a regulatory loss to the owner of the cyclotron might take too much away from the general taxpayer. Similarly, the general public might not want to give up the birds. The owner of the cyclotron and the public, however, might be able to get along without the cyclotron.

Further, the owner of the cyclotron did own property that was the source of the loss. He enjoyed the benefits of its ownership exclusively because the public paid for whatever benefits it received from the cyclotron unless its owner gave them away. Consequently, placing the loss from the cyclotron upon its owner would not single him out for a mindless sacrifice.

Mindlessness is far easier found in nature, itself, or in the operations of the marketplace. The owners of private property should not have a constitutional right to expose the public to the unknown and unavoidable risks of loss that can arise from their operations. It is reasonable, then, under the circumstances, to place upon the owner of the cyclotron a loss that is the fault of nobody.⁴⁴

The economic life-support system rather than human fault is responsible for the loss. It does not follow from this, however, that the general taxpayer should foot either the bill or the consequences. Legislative allocation of the loss rather than accepting what comes naturally or paying full compensation to the owner of private property is likely to be the best way of placing the loss where it will cause the least misery.

Recognition of this legislative power,⁴⁵ however, requires the legislature to be the exclusive judge of whether it should be exercised. No judicial calculus can possibly measure the consequences of exercising or not exercising this power. A predatory state, however, could not use this power as a pretext for making periodic raids upon private property. Exercise of the power would be limited to addressing risks of loss that have an identifiable source, are unknowable beforehand and make loss unavoidable when they become known. Such risks rarely arise.

Thus, the marketplace itself can inflict loss upon the public and make some amenities less available. Most of the risks of the marketplace are known, however, even though their magnitude extends from a mere possibility to something clearly foreseeable. Because the owner of private property can avoid these risks, he does not have a strong claim for demanding that the public accept loss from them when they materialize. *Hadachek v. Sebastian*⁴⁶ shows what is meant.

*Hadachek v. Sebastian - The Brick Factory Case*⁴⁷

Hadachek operated a brick factory upon an eight-acre tract of land that he acquired in 1902.⁴⁸ Initially, the tract was beyond the city limits of Los Angeles, California.⁴⁹ Eventually, urban expansion and the city limits overtook the brick factory.⁵⁰ Eight years after he acquired the tract, the city enacted an

⁴⁴ *Id.*

⁴⁵ See *supra* text accompanying notes 153-162.

⁴⁶ 239 U.S. 394 (1915).

⁴⁷ *Id.*

⁴⁸ *Id.* at 408.

⁴⁹ *Id.* at 405, 408.

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ordinance that shut down the brick factory without compensation because it had halted residential development upon the three square miles of nearby land.⁵¹ The ordinance dropped the value of the brick factory land from \$800,000 to \$60,000 in 1910 dollar values.⁵² The Supreme Court upheld the ordinance.⁵³

People did not want to live in the brick factory smoke.⁵⁴ Also, a real estate developer who could buy out Hadachek and develop the area at a reasonable profit seemed conspicuously missing. The cost of a reasonable buyout was probably prohibitive. This would have made a buyout with special assessments equally futile. Undoubtedly, the general taxpayers would have been reluctant to subsidize a buyout for housing consumers who could afford to buy housing for themselves. Residential and related community development simply was not going to occur as long as the brick factory remained where it was. Either it had to go or people who wanted to go where it was had to go elsewhere.

There was also another brick factory in the same land district where Hadachek manufactured bricks.⁵⁵ The city ordinance shut it down, too.⁵⁶ Perhaps it also smoked up three square miles of comparable land. A constitutional right to a state buyout for the owners of these and similar brick factories would have removed a large amount of real estate from the housing market. The loss of this land would have had its consequences in 1910, before widespread use of the automobile, when use of the horse and buggy or wagon was still an everyday occurrence.

Housing consumers would have had to live closer to the city, possibly in apartments which they wanted to escape, or farther away from the city, with a long commute on the interurban if there was one, or by less desirable means if there was not one. Housing costs probably would have increased. Consumers probably would have paid more and received less, including less amenable neighborhoods in which to live. All in all, that is quite a bit for the owner of a brick factory to expect from the community as the price for conducting his operations, especially when there seemed to be ample brick factories in Los Angeles that did not disrupt community life in any way.⁵⁷

But Hadachek did have something to say in his own behalf. He said that after he acquired the brickland, urban expansion simply fell down upon him from

⁵¹ *Id.* at 406, 409-10. The ordinance was enacted in 1910; *Ex parte Hadachek* 132 p. 584 585 (1913).

⁵² 239 U.S. at 405.

⁵³ *Id.* at 410, 414.

⁵⁴ *Id.* at 406, 409-10.

⁵⁵ *Id.* at 406.

⁵⁶ *Id.*

⁵⁷ *Id.* at 406, 413.
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out of the sky. Upon acquisition of the eight-acre tract, "he did not expect or believe, nor did other owners of property in the vicinity expect or believe, that the territory would be annexed by the city."⁵⁸ He also thought that only "an extremely small amount of smoke" was "emitted from any kiln" in his brick-yard.⁵⁹ It can be assumed, nevertheless, for the purpose of discussion, that what happened to Hadachek seemed beyond the realm of possibility when he made his purchase. No matter how unlikely⁶⁰ or likely this assumption may seem, it does not weaken the case for the state.

A risk that seems beyond the realm of possibility is not much of a risk for a capital entrepreneur to take, considering that he does not have to take any risk at all and that severe consequences will fall upon someone if the risk does materialize. An industrial entrepreneur who does not want to risk his venture capital on a known risk that seems beyond the realm of possibility should stay out of the market, just as a member of the family who cannot stand the heat should stay out of the kitchen. If the entrepreneur does choose to go into the market, however, then any gain that turns up, including a gain that seemed beyond the realm of possibility, should be his. But the same should also be true for any loss that turns up, including a loss that seemed beyond the realm of possibility, even though it arose from a risk that seemed safe enough for the entrepreneur to try to thrust upon the community instead of taking it himself.

The trouble with market risks that seem beyond the realm of possibility is that they materialize so frequently that one should not take such a risk unless he is also prepared to take its adverse consequences. The community did not want any risks that might arise out of Hadachek's brick factory. The Supreme Court correctly held that it did not have to accept any.

Recognition of state regulatory power to destroy the brick factory in *Hadachek v. Sebastian*, however, does not suggest that the state should have unlimited discretion to choose between incompatible land uses. It does not follow from *Hadachek v. Sebastian*, for example, that desire for a new brick factory would permit the state to let an entrepreneur build it and blitz an existing residential neighborhood or even a few isolated houses without compensation from the entrepreneur or the state. Residential development does not preclude needed brick factories the way that some brick factories can preclude needed residential development.

Finding an efficient industrial site for making bricks does not require setting

⁵⁸ *Id.* at 405.

⁵⁹ *Id.* at 406.

⁶⁰ The population of the city of Los Angeles, California was 50,395 in 1890, 102,479 in 1900 and 319,198 in 1910. 2 THIRTEENTH CENSUS OF THE UNITED STATES: POPULATION 152 (1910).

a brick factory down in an existing residential area. It is also possible to locate a brick factory near a few existing houses without imposing an uncompensated loss upon the homeowners. The owner of the brick factory would expect a large gain from his enterprise. He could use some of it to compensate the homeowners. Profitable business operations do not require the severe destruction of private property or the episodic imposition of general loss upon the public.

It is true that the common law of nuisance permitted uses of substantial incompatibility next to each other although one use might noticeably reduce the value of an existing use.⁶¹ These results, however, were due to flaws in the common law and the free market for real estate transactions. They required the cure of central planning by local government. The cure was zoning, and it was provided by a Supreme Court that was firmly committed to *laissez faire*. The cure came in *Village of Euclid v. Ambler Realty Company*.⁶²

*Village of Euclid v. Ambler Realty Company*⁶³ -
*Zoning and Efficiency, Compatibility and
 Amenities for Neighborhoods*

A community may be satisfied with the advantages and disadvantages of a common law system of land use controls. Houston, Texas is one noticeable example.⁶⁴ But the widespread adoption of zoning in large metropolitan areas speaks well for zoning. The adoption of zoning, however, is not cost-free. Zoning can inflict large disproportionate loss upon some landowners. The loss can approach loss allowed by the free market and the common law of nuisance as supplemented by the legislative power to suppress the preclusive use that the case of *Hadachek v. Sebastian* authorizes.

Thus, in *Village of Euclid v. Ambler Realty Company*, a real estate broker stood upon his own land to the east of Cleveland, Ohio, and what his eye could see brought joy to his heart. He could see a stream of industrial and commercial development moving toward him from Cleveland,⁶⁵ and it was going to run over

⁶¹ The common law of nuisance did not prevent a landowner from making a use of his land merely because it would reduce that value of another person's land; *See REINSTATEMENT (SECOND) OF TORTS* Sec. 822, 826, 827 (1977). *Village of Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926) shows that prior to land use zoning, single-family residential areas were at risk to invasion by retail stores, other businesses, apartments and perhaps an occasional industrial establishment; *Id.* at 388. Sometimes, apartments would make an area useless for detached residences; *Id.* at 394.

⁶² 272 U.S. 365 (1926).

⁶³ *Id.*

⁶⁴ On Jan. 10, 1991, the City of Houston, Texas, enacted ordinance no. 91-63, which created a planning and zoning commission and authorized land use planning and zoning. Prior to the enactment of this ordinance, Houston had been the largest city in the nation without zoning; 14 *Encyclopedia Americana* 499, (International Ed. 1989).

⁶⁵ 10 *ENCYCLOPEDIA AMERICANA*, INTERNATIONAL EDITION, 651 (1989).

the very ground upon which he stood.⁶⁶ He would soon be rich. Then, the Village of Euclid enacted a comprehensive zoning ordinance that diverted some of this horn of plenty to other landowners.⁶⁷

When this happened, the Village consisted of twelve to fourteen square miles of largely undeveloped acreage and a population of between five thousand and ten thousand persons.⁶⁸ Whether or not zoning made the real estate broker poor, he did end up being considerably less rich. He lost 75% of the value of some of his land, compared to Hadachek's 92.5% loss.⁶⁹ But both Hadachek and the broker were going to stop or divert urban residential development. Whoever dislikes *Hadachek v. Sebastian*, then, also has to dislike *Euclid*.

The benefits of zoning are impressive, nevertheless. Zoning minimizes the disharmony and disutility of incompatible land uses. It brings residential districts with detached, single-family homes and beautiful, serene, shady, tree-lined streets where children can safely play, and adults can relax nearby, free from noisy apartments, the clang and clatter of the shopping district, the howl of the industrial zone and the nervous disorders and other ill effects that follow in the wake of all of this tumult and traffic.⁷⁰

Zoning also maximizes real estate values overall.⁷¹ It is true that the price for these benefits is the displacement of the free market with government planning. But surely a few persons do not have a constitutional right to insist upon free market operations when they will leave almost everyone worse off. It is difficult to make a strong case for the constitutional right to make things a mess. The discomfort of life in an urban industrial community without zoning, however, might be much greater than that threatened by the continued operation of Hadachek's brick factory. Undoubtedly, the disadvantages of the common law of nuisance and the free market for real estate transactions gave enough notice to participants in this market that the applicable law might change.

These disadvantages, however, may not have existed in *Euclid* at all. Instead, the situation in *Euclid* seemed like a landowner's dream almost come true until the landowners, themselves decided to adopt zoning and let the dream pass them by. Perhaps they had a different dream.

⁶⁶ 272 U.S. at 384-85.

⁶⁷ *Id.* at 379-80, 384-85.

⁶⁸ *Id.* at 379.

⁶⁹ *Id.* at 384, *see supra* text accompanying notes 48-56.

⁷⁰ *Id.* at 394.

⁷¹ *See* HAGMAN & JUERGENSMEYER, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW*, 62 (1988, Ed.).

In *Euclid*, distinguished counsel for Ambler Realty said that industry wanted to buy every square foot of land in the village.⁷² This submission might have been hyperbole, but the court decided to rule upon it anyhow.⁷³ The court necessarily held that zoning can be constitutional when it reduces the value of everyone's land, of the land of voters who do not want this to happen to their land, as well as the land of voters who are eager to reduce the value of their own land.

The facts of the case do not reveal the landowners who were the beneficiaries of Euclid's zoning plan or exactly what all of its benefits were. Surely the sale of undeveloped acreage for factory use would have brought its owners enough money to have purchased a residence with suitable spacious grounds somewhere else in the Cleveland area. Further, the owners of improved property in the village probably would have had a similar opportunity to increase their net worth.

Perhaps the existing residents, however, were afraid that they might become an isolated, valueless residential pocket in a huge expanse of industrial development. Possibly, all residents of the village believed that, in union, there was strength, and they decided to present a united front in the form of a zoning ordinance to prevent industrial purchasers from picking them off one at a time for much less money than negotiated sales on an area basis would bring. Maybe the residents of the village wanted to save as much of its rural character and charm as an enhanced industrial tax base would allow, while making the necessary compromise to accommodate the needs of heavy industry.

Conceivably, a village like Euclid might have matchless charm that would be enhanced by the bright lights and cultural attractions of the big city next door. The residents of the village might have all of the pleasures of two different worlds at their fingertips.⁷⁴ In any event, *Euclid* allowed the state to require some landowners to forego potential gain from land so that other persons could enjoy better living conditions in urban metropolitan areas.

There are limits, naturally, to the potential gain that the state can command landowners to forego in the interest of better living conditions for other persons. *Pennsylvania Coal Company v. Mahon*,⁷⁵ which was decided before *Euclid* but

⁷² Newton D. Baker, who was President Woodrow Wilson's Secretary of War during World War I, was counsel for Ambler Realty Company; 3 *ENCYCLOPEDIA AMERICANA, INTERNATIONAL EDITION*, 68 (1988 Ed.); 272 U.S. at 371, 374 (argument for appellee).

⁷³ 272 U.S. at 389-90.

⁷⁴ See *supra* text accompanying notes 194-211.

⁷⁵ 260 U.S. 393 (1922).

after *Hadachek*, set forth some limits. In *Euclid* and *Hadachek*, a few landowners claimed the constitutional right to shape the character and future of the community with free market transactions. Their effort failed. In *Mahon*, a few landowners contracted to take away the long-term future of numerous coal communities. Their effort was crowned with success.

Euclid was different than *Mahon*, nevertheless. In *Mahon*, all of the landowners wanted to sell out.⁷⁶ Further, the court did not allow state intervention in *Mahon* to prevent loss of community and a living place within it for future generations.⁷⁷ Their interests had been bargained away before they could be consulted or do anything about it. There was nothing that they or anyone else could do about it anyway. It was none of their business. It was none of the state's business either.⁷⁸

*Pennsylvania Coal Company v. Mahon*⁷⁹ -
Coal Communities On Top Of A Collapsible
Fee Simple Absolute

Mahon is from a completely different world than the America of today. The decision itself was harsh when life was not easy. Perhaps the rough and tumble temper of the times and the outlook that shaped the *Mahon* judges may help to account for the outcome in the case. Even so, some readers have always been unable to read the opinion without setting it down in utter disbelief.

In acquiring the right to mine coal in the anthracite region of Pennsylvania, the coal industry let other persons own the land surface in the anthracite locations, hamlets, villages, town and cities in the state.⁸⁰ The coal industry naturally reserved the right to mine the coal. Further, the industry, reluctant to leave any money unnecessarily lying in the ground, also reserved the right to mine away the coal support pillars that helped to keep the anthracite communities above ground.⁸¹

Understandably, the day came when the legislature forbade removal of the coal support pillars.⁸² Litigation ensued over the constitutionality of what the legislature had done. The rest is constitutional history.

⁷⁶ *Id.* at 412, 414-16. See *supra* text accompanying notes 121-128.

⁷⁷ *Id.* at 414-16.

⁷⁸ *Id.* at 414.

⁷⁹ 260 U.S. 393 (1922).

⁸⁰ *Id.* at 412-414.

⁸¹ *Id.*

⁸² *Id.* at 412-13. Published by IdeaExchange@UAKron, 1992

The Supreme Court, with Justice Oliver Wendell Holmes, Jr. as it spokesman, held that legislative prohibition of a mining practice that threatened destruction of the anthracite communities violated the takings clause of the Constitution.⁸³ The holding meant that the support pillars had to be bought and paid for if support for the surface was desired. It was unlikely, of course, that the value of the surface with improvements was much more than the value of the support pillars and, quite possibly, the surface was worth a lot less. However, if something worth the purchase price of a home was required to retain an existing home in an anthracite community, then it might have been advisable to locate one as far away from a coal mine as possible. The ruling in *Mahon* simply meant that collapsible fee interests in the surface throughout the anthracite communities would collapse after prudent completion of terminal coal mining operations.

Mahon, obviously, is not a natural companion of *Hadachek* or *Euclid*. The latter two cases permit a large regulatory reduction of property interests to allow residential and related community development to begin. *Mahon*, on the other hand, disallows a comparable state reduction of property interests to allow such development to last after it is in place.

One apparent difference between *Mahon* and the other two cases is that property owners in *Mahon* were well-paid for consenting in advance to loss of their property interests. Their counterparts in *Hadachek* and *Euclid*, on the other hand, did not bargain away residential and related community development to industrial enterprise. Upon examination, however, the presence or absence of consent to what the state tried to prevent in all three cases does not seem to distinguish *Mahon*.

Arguably, this suggested difference might be important if all that the coal industry had wanted to do in *Mahon* was to construct mining camps and then demolish them after there was nothing more to mine. Mining camps, after all, do not have much capacity for acquiring a lasting life of their own run. Further, a mining camp can be as spartan or as elegant as the employer desires. The gold fields in Alaska often had tents and saloons with attached appurtenances. It is also possible for mining camps to have well-ventilated dormitories, dining halls, recreational facilities and areas where visitors can be received.

The coal industry of Pennsylvania, however, did not prefer such arrangements. Instead, the industry wanted ordinary communities, complete with everything that ordinary community life has. Laying out towns and cities or deciding how long they will last, of course is traditional subject matter of the

police power.⁸⁴ Today, an attempt by industry to do what the coal industry arranged in *Mahon* probably would not survive the initial encounter with the appropriate land use planning authority. The law is that private parties cannot reduce the power of the state to govern a matter by making a contract about it.⁸⁵ The law is that the police power cannot be bargained away by the state itself.⁸⁶

Still, what the coal industry wanted to do in *Mahon* might have conformed to these controlling propositions of law if its operations had been relatively short-term. The industry, however, waited two generations to pull out the support pillars beneath some anthracite communities⁸⁷ and nearly a century before it began to lay waste to some of the bituminous coal communities in the southwestern part of the state.⁸⁸

The power to destroy the land surface of huge areas of northeastern and southwestern Pennsylvania and to uproot and displace a substantial part of the state's population, after two or three generations, does not resemble ordinary short-term mining operations. The *Mahon* Court, however, did not directly address the constitutional legitimacy of this vast amount of traditional government power that the coal industry had reserved for itself and wanted to keep. Instead, the court's judgment in *Mahon* resembled disposition of a petty land dispute between two private parties because one of them unjustifiably thought that he had made a bad bargain for his interest in Blackacre.⁸⁹

Many communities have the power to exist long after exhaustion of the forces that created them. This is as true for factory towns as for mining towns. Dawson City is still in the Yukon even if the faint traces of its once prosperous gold industry are now primarily tourist attractions. Other communities have made comparable adjustments. Some of these communities succeeded because their infrastructure did not expire with the death of their founding industries.

The conflict between the interests of private property and the public in *Mahon* was like the similar conflicts in *Hadacheck* and *Euclid*. The question in all three cases was whether the community needed living space more than

⁸⁴ Cf. *Marsh v. Alabama*, 326 U.S. 501 (1946) (a private corporation must observe the constitution when it operates a company town, including provision of municipal services, and it cannot prevent handbilling in the streets of the town.).

⁸⁵ *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 357 (1908).

⁸⁶ *Stone v. Mississippi*, 101 U.S. 814 (1880); *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 22-23 (1977) *reh den*, 431 U.S. 475 (1977); J. Nowak & R. Rotunda, *CONSTITUTIONAL LAW* 398-99 (4th Ed. 1991).

⁸⁷ The deed that reserved the right to mine the coal support pillars for the Mahon property was executed in 1878. 260 U.S. at 412.

⁸⁸ See *Keystone Bituminous Coal Ass'n v. De Benedictis* 480 U.S. 470, 478 (1987).

⁸⁹ 260 U.S. at 415.

industrial space in a particular land area. Further, it is not completely clear that *Mahon*, overall, gave constitutional protection to interests of greater dollar value than the interests whose destruction it authorized. Moreover, the balance of interests struck by the court seems warped if the different values of family, hearth, home and community are thrown into the weighing scales.

The private property and contractual arrangements in *Mahon* were meant to prevent this kind of balancing from ever occurring at all. Such a weighing process required the factor that the Pennsylvania legislature eventually provided. It was that protection of community interests required support rights for the surface even though they could only come from part of a coal seam that had already been sold for coal.

This legislature adjustment would have prevented use of the coal support pillars as coal by anyone unless the surface and subsurface owners agreed. The surface owners would not have agreed unless life would have been the same or better for them after the agreement. There would have been no agreement in economically viable coal communities if it meant giving up a satisfactory life there for an uncertain life elsewhere.

One might reply, however, that such an arrangement would permit some surface owners to hold out for a king's ransom. Denying the existence of this possibility would be foolish, of course, but it vastly underrates the tremendous motive power of money and the desire to add some of it to one's larder or, at least, to preserve what one has without losing the opportunity by foolishly insisting upon a regal sum. Holdouts did not prevent the *Mahon* arrangements from being made initially. They would have been no barrier subsequently if the relevant economic forces were propitious. Besides, the Pennsylvania legislature could have intervened again and let residual coal mining work matters out if something whimsical got in the way of economic or other good sense.

Permitting the interplay of economic forces that the Pennsylvania legislature set in motion in *Mahon*, however, might seem to be a taking of the coal industry's support pillars. One can wonder, nevertheless, whether there would have been any ascertainable loss if the value of the lost interests were measured when the coal mining arrangements were first made. Fixing value this way would involve the value to remove residual coal a half or whole century after mining operations began. Whatever these rights were worth then, they seem very distant from money in the bank.

It should make no difference, however, whether these rights initially were a purse of gold or a gambler's chance. One can assume that the value of the residual mining rights was as measurable when they were created as when the Pennsylvania legislature foreclosed them. However value and loss are calculated,

the loss is not different from the loss in *Hadachek v. Sebastian*⁹⁰ or *Village of Euclid v. Ambler Realty Co.*⁹¹ In all three cases, private property had the right to seriously disrupt community life, absent legislature intervention. Profitable brickmaking, steel mills and automobile factories, however, did not require serious disruption of community life. The same was also true of profitable coal mining.

Moreover, what the Pennsylvania legislature did in *Mahon*, as well as what the coal industry did initially arguably made good sense. Arrangements were made to mine anthracite coal in Pennsylvania long before the turn of the century.⁹² Looking fifty or a hundred years ahead, leaving coal support pillars in the ground for ghost towns might turn out to be an enormous waste, but so might wasting the community just to get the support pillars. Thus, looking ahead from the outset, the appropriateness of removing the support pillars would ultimately depend upon the acceptability of slash and burn coal mining to the community or to the supreme court of the United States. Either way, the coal industry did not have a sure thing.

Thus, the arrangements for mining coal in *Mahon* were made to last a century or longer, if necessary. What the community would look like and what interests it would seek to protect from mining one hundred years ahead required considerably more foresight than *Hadachek* possibly could have had when he fired up his brick factory at the turn of the century only eight years before it was closed. Both should have considered the possibility of the development of a different community than the one on which they bet their money.

The greatest surprise in *Mahon* was its constitutional blessing for an extremely destructive coal mining practice. That this constitutional right lasted as long as it did is almost equally surprising. The residual mining rights in *Mahon* were always a gambler's chance.⁹³ Eventually, the Supreme Court took the chance away. The decision that did this likely brought disappointment to the coal industry, but genuine surprise seems out of the question. Attention will now turn to decision that took away this gambler's chance.

⁹⁰ 239 U.S. 394 (1915).

⁹¹ 272 U.S. 365 (1926).

⁹² 480 U.S. at 478. The Mahons' deed in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 412 (1922) was executed in 1878.

⁹³ The anthracite mining at issue in *Mahon* was secondary or residual mining; 260 U.S. at 406, (argument for Pennsylvania); see Rose, *Mahon Reconstructed: Why The Takings Issue Is Still A Muddle* 57 S. CAL. L. REV. 561, 578-79 (1984).

*Keystone Bituminous Coal Association v. De Benedictis*⁹⁴ -
The Modification of Mahon

The primary difference between *Keystone* and *Mahon* is that *Keystone* arose in the bituminous coal region of southwestern Pennsylvania whereas *Mahon* involved the anthracite region in the northeastern part of the state. In both cases, the coal industry had made the same arrangements for the coal, the coal support pillars and the surface.⁹⁵ The Pennsylvania legislature forbade removal of the support pillars to protect the economic viability of coal communities in both cases⁹⁶ and to protect the environment in *Keystone*. The coal industry, to the great surprise of nobody, said that *Keystone*⁹⁷ was a replay of *Mahon*.⁹⁸

The coal industry in *Keystone* simply claimed that the law forbidding removal of the bituminous coal support pillars was unconstitutional on its face⁹⁹. Stated another way, the law had no valid applications.¹⁰⁰ The Court bluntly rebuffed this facial challenge on the ground that the law did not preclude profitable bituminous coal mining.¹⁰¹

This riposte, however, failed to explain why the ruling in *Mahon* did not have a valid application in *Keystone*. *Mahon* had held that the law prohibiting removal of the coal support pillars was unconstitutional "so far as it affects the mining of coal under streets or cities where the right to mine such coal has been reserved."¹⁰² The *Keystone* Court was able to overcome the obstacle presented by this ruling, however. The court explained that the ruling was non-binding.

The sole complaining parties in *Mahon* were the owners of a single house

⁹⁴ 480 U.S. 470 (1987).

⁹⁵ *Id.* at 478; 260 U.S. at 412, 414.

⁹⁶ 480 U.S. at 485-86, 488. Justice Brandeis, the sole dissenter in *Mahon*, would have upheld the challenged law as a safety measure. 260 U.S. at 420. Considering the likely response of the Supreme Court to the argument that the economic welfare of the anthracite coal communities justified a severe regulatory destruction of property rights, the parties who supported the challenged law did emphasize the peril to public safety of removing the subsurface support for populated areas; 260 U.S. 404-06, argument for Pennsylvania. Still, it was clear to the parties and the Pennsylvania Supreme Court that the economic well-being of the coal communities was at stake; *Id.* at 405-06, 409, 411; *Mahon v. Pennsylvania Coal Co.* 118 A. 491, 492-95 (1922). The four dissenting justices in *Keystone* thought that both *Keystone* and *Mahon* involved substantially the same state objectives, including protection of the economic welfare of the community. 480 U.S. at 509-11.

⁹⁷ 480 U.S. at 485-86, 488.

⁹⁸ *Id.* at 481.

⁹⁹ *Id.* at 493-96.

¹⁰⁰ *Id.* at 494, n.23, 496-97.

¹⁰¹ *Id.* at 495-96, 499, 501.

¹⁰² 260 U.S. 393, 414 (1922).

in the city of Pittston.¹⁰³ Invoking Pennsylvania's Kohler Act, which forbade the removal of coal support pillars, they sued to enjoin mining that would cause their house to subside into the ground.¹⁰⁴ In addressing their claim, the court observed that it was not called upon to consider the plaintiff's situation alone, but that if it were, the protection of a single house from subsidence was not enough of a public interest to justify destruction of the right to mine coal.¹⁰⁵

Having said that, the *Mahon* Court then proceeded to explain that the case had been treated as one that challenged the general validity of the Kohler Act, and the court declared the act unconstitutional.¹⁰⁶ The scope of the ruling seemed sensible in view of the various interests that were represented before the court, including the state of Pennsylvania and the city of Scranton.¹⁰⁷ Besides, the plaintiffs, themselves, lived in a city and sought the Kohler Act's protection for the inhabitants of cities.

The *Keystone* Court, however, saw *Mahon* quite differently than *Mahon* had seen itself. *Keystone* held that the Court's apparent ruling on the general validity of the Kohler Act went beyond what a decision in the case actually required.¹⁰⁸ Seen through the eyes of the *Keystone* court, *Mahon* presented only the case of a single house and nothing more and decided only that protecting it did not justify destruction of the right to mine coal.¹⁰⁹ Consequently, the *Keystone* Court explained, everything that *Mahon* had said about the general validity of the Kohler Act, including the polestar pronouncements about the doctrine of regulatory takings was an advisory opinion.¹¹⁰

As an advisory opinion, most of *Mahon* was weightless as a precedent, apart from the unremarkable proposition that a regulatory destruction of private property must be supported by a public purpose.¹¹¹ This meant that *Mahon* did not actually rule upon how much coal a legislature can require to be left in the ground to support surface communities after they have bargained away their support rights. *Keystone* filled this gap, however. The answer was 27,000,000 tons provided profitable mining was still possible.¹¹² Four dissenting judges

¹⁰³ *Mahon v. Pennsylvania Coal Co.*, 118 A. 491, 492 (1922).

¹⁰⁴ 260 U.S. at 412.

¹⁰⁵ *Id.* at 414.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ 480 U.S. at 483-84.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 484.

¹¹¹ *Id.* at 484. See *supra* text accompanying notes 114-120.

¹¹² 480 U.S. at 498. change@UAKron, 1992

protested in vain.¹¹³

Keystone also mentioned another difference between *Mahon* and itself. *Keystone* said that the Kohler Act in *Mahon* "made it 'commercially impracticable' to mine 'certain coal.'"¹¹⁴ What the Court meant to imply by this statement is uncertain, however. The Court did not say that a protective law for surface support in coal communities that made any anthracite mining unprofitable would be invariably unconstitutional.

The coal industry was removing support pillars in the city of Scranton when *Mahon* arose.¹¹⁵ Undoubtedly, the Kohler Act made such mining unprofitable because the act forbade it. *Keystone*, however, did not condemn such protective legislation although the challenged law in *Keystone*, which the Court upheld, forbade such residual mining and made it equally unprofitable.¹¹⁶

Moreover, there was no showing in *Keystone* or *Mahon* that profitable anthracite¹¹⁷ mining was generally impossible without removing the support pillars for surface coal communities although these pillars may have constituted one-fourth to one-third of the coal in an anthracite mine. In fact, anthracite mining had been conducted for more than three decades when *Mahon* arose,¹¹⁸ and there was no indication that it was unprofitable until the support pillars were removed. Therefore, the reference in *Keystone* to unprofitable mining in *Mahon* left open the general, hypothetical, abstract question of whether the state can ever forbid removal of coal support pillars for coal communities when the restriction will make mining unprofitable.

In any event, *Keystone* makes it unmistakably clear that a legislature can prohibit exercise of the right to remove coal support pillars to protect coal communities overhead, provided profitable coal mining does not require removal

¹¹³ *Id.* at 506.

¹¹⁴ *Id.* at 484.

¹¹⁵ *Id.* at 498. Residual mining had caused cave-ins in Scranton before *Mahon*. See Rose, *Mahon Reconstructed: Why The Takings Issue Is Still A Muddle*, 58 S. CAL. L. REV. 561, 578-79 (1984).

¹¹⁶ *Id.* 480 U.S. at 501. Secondary or residual mining, however, may be profitable without removing support pillars for coal communities provided the mine has enough other coal. Still, it is apparent that the mining restrictions in *Keystone* would make secondary mining become unprofitable when only these support pillars remained in the mine, although operations were profitable until then. Further, it would seem strange to hold that the constitution invalidates protective legislation for the support of surface land in coal communities above profitably operated coal mines whose only coal, when the legislation is enacted, is support pillars for these communities. The *Keystone* court, however, seems to have left this situation unresolved although it may not arise.

¹¹⁷ See *Mahon v. Pennsylvania Coal Co.*, 118 A. 491, 498 (1922) (dissenting opinion of Justice Kephart); Rose, *Mahon Reconstructed: Why The Takings Issue Is Still A Muddle* 57 S. CAL. L. REV. 561, 567, n.38 (1984). Compliance with the restrictions in *Keystone* may have required 2% of the coal to be left in the ground; 480 U.S. at 496.

¹¹⁸ 260 U.S. 393, 412 (1922).

of the pillars.¹¹⁹ This judicial modification of *Mahon* brought *Hadachek*, *Euclid* and *Mahon* in line with each other and the fair return model of the takings clause and police power. Old *Mahon*, on the other hand, is the model of laissez faire capitalism. This model of *Mahon*, the internal inconsistencies of the model and the difficulty of reconciling it with *Hadachek* and *Euclid* will be discussed now.

A Laissez Faire Model of the Takings Clause and Police Power

Pennsylvania Coal Company v. Mahon fits the laissez faire model of government. The regulatory objective in *Mahon* was beyond the scope of the police power.¹²⁰ A constitutional regime of laissez faire puts many objectives beyond the scope of the police power. It also puts them beyond the reach of everyone who wants or needs what they can provide when the free market makes these objectives unattainable.

Mahon held that the objective of preserving the economic viability of the community did not justify a severe disproportionate regulatory destruction of property interests that, themselves, threatened the economic viability of the community, but no other police power interests.¹²¹ The objective of preserving the economic viability of the community was not a valid governmental regulatory objective under the circumstances.¹²² This proposition, however, does not provide an easy basis for distinguishing *Mahon* from *Hadachek* and *Euclid*. Other apparent grounds for differentiation are equally unsuitable.

The land use in *Hadachek*, for example, can overpower neighboring uses, and the weak may deserve the protection of the state from the strong. But *Hadachek* was a congenial neighbor, initially, and, according to him and others, everything suggested that he would be a congenial neighbor forever.¹²³ Still, *Hadachek* ended up losing a large amount of property to make living congenial for others. A comparable loss for the same purpose befell the real estate broker in *Euclid*.¹²⁴ *Mahon*, however, forbade a similar loss for a similar purpose.

One might also suggest that *Hadachek*'s brick factory became a clog on free market in real estate transactions. Similarly, heavy industrial use of the undeveloped acreage in *Euclid* would have been a clog upon the rustic growth of the village from the village green outwards. The coal industry in *Mahon*, on the other hand, was merely going to add the finishing touch to real estate transactions

¹¹⁹ 480 U.S. at 495-96, 499, 501.

¹²⁰ 260 U.S. at 414.

¹²¹ The court explained why conservation and safety did not justify the regulation; *Id.* at 413-14.

¹²² *Id.* at 414.

¹²³ 239 U.S. 394, 405 (1915).

¹²⁴ Published by IdeaExchange@UAKron, 1992
272 U.S. 365, 384 (1926).

that had been fairly approved in the free market. But the finishing touch was going to terminate the free market for some real estate transactions, as well as other transactions, altogether. Destruction of a market will injure it more than a clog.

Still, *Hadachek* and *Euclid* might be different than *Mahon* somehow. Undoubtedly, the business undertakings of Hadachek and the real estate broker in *Euclid* received less than the overwhelming support of the community when they were first disclosed. Therefore, regulatory suppression might have been initially anticipated in *Hadachek* and *Euclid*.

Almost everyone in *Mahon*, on the other hand, must have applauded the arrangements for mining coal from the moment that they were made because of the prosperity that they would bring. The state, however, did not intervene in *Mahon* to protect the persons who made the arrangements or who provided the applause at the ribbon-cutting ceremony to celebrate them. These persons did not need any protection. They were going to become prosperous.

The *Mahon* Court's explanation of its decision does not provide a basis for differentiation either. The Court seemed to say that the surface landowners would simply lack any property to stand on for long, once the coal industry removed the support pillars for their collapsible fee interests.¹²⁵ The court compared the surface landowners to tenants who wanted to hold over after the lease had expired without the consent of the landlord.¹²⁶ In this respect, the court said that the Pennsylvania legislature had tried to do more for the surface landowners than recent valid rent control legislation that was addressed to the aftermath of World War I had done for tenants.¹²⁷ Finally, the Court said that this rent control legislation had gone to the "verge of the law,"¹²⁸ which indirectly said that peacetime rent control ordinarily would be beyond the verge and violate the takings clause.

The court's analogy does reveal what was on its mind, but it also fails to distinguish *Mahon* from *Hadachek* and *Euclid*. There would have been no residential land for anyone to stand on near Hadachek's brick factory while this land was filled with smoke. Homeowners in *Euclid* would have had no attractive residential land sites to stand on if industry had bought them all.

The government objectives in *Hadachek* and *Euclid* required severe, disproportionate loss of property that was held constitutional. The outcome in

¹²⁵ 260 U.S. at 415.

¹²⁶ See *id.* at 416.

¹²⁷ *Id.*

Mahon was inexplicably different. *Mahon* simply held that Pennsylvania's regulatory objective was impermissible and, consequently, that the state's regulation was a taking, but the Court did not say why. The explanation of *Mahon* is not found in *Mahon*.

Hadacheck and *Euclid* hold that a severe regulatory loss of property is permissible to make life in an urban industrial community viable. They say nothing about such a sacrifice to prolong the life of a community beyond its time. *Mahon* holds, on the other hand, that a severe regulatory loss of private property is impermissible to permit a wasting asset community to survive its wasting asset industry after property and contractual arrangements have been made to terminate both together pursuant to prudent business practice.

The loss of a community due to business operations in the marketplace is nothing unusual, especially in mining. Capital will go elsewhere when it happens, and the people of the community can go elsewhere, too. Mobility of capital and labor keeps the industrial system humming. Legislative interference with the efficient operations of the marketplace would be foolish. It would impose a severe, unjustifiable loss upon property and misallocate resources to the ultimate loss of everyone. It is submitted that this is the reason why the Pennsylvania legislature went "too far"¹²⁹ in *Mahon*.

The constitutional laissez faire system of the time had distinctions of this kind. The market, itself, was virtually the exclusive regulator of rents,¹³⁰ prices¹³¹ and wages.¹³² Price control was permissible only for a business that was affected with a public interest.¹³³ Only history, itself, affected inns, cabs and grist mills with a public interest,¹³⁴ but the affectation was enough to permit pervasive state regulation of these enterprises.¹³⁵ The ice business, however,

¹²⁹ *Id.* at 415.

¹³⁰ Ordinary peacetime rent control was said to be unconstitutional in *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 546-48 (1924); cf. *Block v. Hirsh*, 256 U.S. 135, 156-57 (1921); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 416 (1922).

¹³¹ *Williams v. Standard Oil Co.*, 278 U.S. 235, 239-40 (1929), *overruled* by *Olsen v. Nebraska*, 313 U.S. 236 (1941).

¹³² *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

¹³³ *Williams v. Standard Oil Co.*, 278 U.S. 235, 239-40 (1929), *overruled* by *Olsen v. Nebraska*, 313 U.S. 236 (1941). *Wolff Packing Co. v. Court of Industrial Relations of Kansas*, 262 U.S. 522, 535-36 (1923) said that there were three general classes of business that were affected with a public interest: (1) a business that depended upon a public grant or franchise, such as a common carrier or a public utility; (2) a business that was regarded as exceptional and affected with a public interest historically, such as an inn, cab or grist mill; and (3) a business that grew to be of great importance to the public although it was not affected with a public interest at its inception, such as banking or insurance. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* Sec. 8-4, at 570-74, n.24 (2nd ed. 1988).

¹³⁴ 262 U.S. at 535.

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was not affected with a public interest,¹³⁶ whereas the business of operating a cotton gin was so affected because¹³⁷ it was like the business of operating a grist mill.¹³⁸ The Supreme Court created and used the public interest doctrine as a device to strike down price regulation except in situations where the Court's vague divining wand indicated that the free market with the support of the antitrust laws would not work efficiently with fairness.¹³⁹ Consequently, the Court's use of the public interest doctrine preempted the legislative function, and the Court discarded it for this reason some time ago.¹⁴⁰

Related precedents also undid the rest of the constitutional system of laissez faire.¹⁴¹ The rationale for *Mahon* went with it.¹⁴² State regulation of property interests now conforms to the fair return model of the takings clause. It remains to be considered, then, whether this model provides adequate advance notice of regulatory loss to regulated property owners.

The issue of Adequate Advance Notice of Regulatory Loss to Regulated Property Owners

Regulated property owners want advance notice of regulation in order to have the opportunity to avoid regulatory loss of their property. What they would like to have in the way of accommodation for this purpose, however, involves more than notice. It is also impossible to provide it without unduly limiting the police power.

It is usually easy for a property owner to receive notice of whether what he wants to do with his property involves the possibility of losing it due to state regulation. All that the property owner has to do is simply to think about the possible consequences to others of the action that he would like to take. This process would provide adequate notice of possible regulation to the reasonably

¹³⁶ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 277 (1932).

¹³⁷ *Id.* at 273-76.

¹³⁸ *Id.*

¹³⁹ Hamilton, *Affectionation With Public Interest*, 39 YALE L.J. 1089, 1101, 1107 (1930).

¹⁴⁰ *Ferguson v. Skrupa*, 372 U.S. 726, 728-31 (1963) (state can abolish the business of debt adjusting based upon its own conception of what the public interest requires.); *Olsen v. Nebraska*, 313 U.S. 236, 245-46 (1941) (state can prescribe maximum fee that employment agencies can charge for services to executive, technical and professional workers.); *Nebbia v. New York*, 291 U.S. 502, 531-32, 536 (1934). See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 582 (2nd ed. 1988).

¹⁴¹ See *supra* note 22.

¹⁴² *Keystone Bituminous Coals Ass'n v. De Benedictis*, 480 U.S. 470 (1987). See *supra* text accompanying notes 94-119; *Eisen v. Eastman*, 421 F.2d 560, 567 (2d Cir. 1969), *cert. den.* 400 U.S. 841 (1970) dismissed a constitutional challenge to New York City's rent control program in a single paragraph. *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875 (1983) upheld an ordinary peacetime rent control ordinance on the merits by summarily disposing of a constitutional challenge to the ordinance upon appeal for lack of a substantial federal question; cf. *supra* note 130.

alert property owner. Nobody had to explain to Hadachek that a brick factory precludes nearby residential development, or to tell the real estate broker in *Euclid* that the common law of real property presents similar obstacles, or to give notice to the coal industry in *Mahon* that removal of the coal support pillars for the surface will cause the surface and any improvements thereon to collapse.

Regulated property owners obviously are not demanding this kind of notice because they already have it. Instead, they want better notice. What they really want is the constitutional freedom to act or to commit their investment principal without being proscribed afterwards unless their action is illegal at the outset or there is a high degree of certainty then that it will become illegal.¹⁴³

It is submitted that property owners expect too much. Giving this kind of notice would require the state to enact regulations to fix things when they might not get broken and to address problems that are completely unknowable until they arise. Moreover, the law usually has some difficulty catching up with problems that have existed for a long time. Occasionally, a problem solves itself before regulation to address it is enacted. Rarely is the enactment of needed legislation a complete surprise.

The property owner usually will have an opportunity to avoid regulatory loss by investing his principal in an activity that will not elicit severe regulation. Sometimes, however, regulatory loss will occur without any inkling, beforehand that it was a possibility. It is impossible for the regulated property owner to receive prior notice in this situation, but when notice is impossible, the Constitution should not require it. The notice issue, then, is really a non-issue. Discussion of a few situations that involve protective regulation of the environment will provide additional examples of what is meant.

A FAIR RETURN MODEL OF THE TAKINGS CLAUSE AND THE POLICE POWER

Environmental Regulation

Occasionally, but rarely it would seem, a use of property may give it a market value before there is any indication that some loss to the public may arise from the use. Consequently, subsequent regulation that forbids the use would be a genuine surprise for the property owner. Environmental regulation may be an area where such a surprise is most likely, although cases of genuine surprise, even here, may be as uncommon as some of the wildlife species that environmental regulation protects.

¹⁴³ See the accompanying notes, 3-12, 41-42.

Environmental harm and protection have been around long enough to alert the prospective investor in land that his investment may be at risk to environmental regulation. The stripmining of coal, for example, has always had an obvious devastating impact on the environment.¹⁴⁴ Consequently, it should not have come as a surprise to anyone that constitutional congressional regulation for the restoration of stripmined areas seemed like an invitation to leave the coal in the ground.¹⁴⁵

Wetlands protection has been upheld for some time. *Just v. Marinette County*¹⁴⁶ was decided in 1972. In *United States v. Riverside Bayview Homes, Inc.*,¹⁴⁷ the Supreme Court left open the possibility that some wetlands protection might be a taking of property,¹⁴⁸ but it also said that regulatory takings hardly ever occur.¹⁴⁹ Recently, Maine and Vermont have successfully forbidden real estate development that threatened deeryards in these states.¹⁵⁰

Such examples of environmental regulation may seem so commonplace that they may not appear to implicate the takings clause at all. Other examples, however, especially hypothetical situations, are extreme enough to test the limits of the police power and the constitutional claim for notice of regulation that destroys the value of property. The snail darter and the northern spotted owl come readily to mind.

The snail darter almost killed a government dam.¹⁵¹ The last northern

¹⁴⁴ *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 277 (1981) mentions congressional findings that erosion, landslides, flooding, water pollution and destruction of soil and wildlife habitat are some of harms that stripmining causes.

¹⁴⁵ Stripmine operators are required to restore stripmined land to its prior condition and approximate original contour, to segregate and preserve the topsoil, to minimize disturbance to the hydrological balance of the land, to construct coal mine waste piles used as dams or embankments, to revegetate the area and to dispose of spoil; *Id.* at 269.

¹⁴⁶ 56 Wis. 2d 7, 21, 201 N.W.2d 761, 772 (1972) (state prohibition of filling-in wetlands was held constitutional).

¹⁴⁷ 474 U.S. 121 (1985).

¹⁴⁸ *Id.* at 128.

¹⁴⁹ *Id.* at 126.

¹⁵⁰ *In Re Southview Associates* 153 Vt. 171, 172, 174, 569 A.2d 501, 504 (1989) (prohibition of a 33-unit residential development project for vacation homes to protect a herd of 20-50 deer was held authorized by state law); *Seven Islands Land Co. v. Maine Land Use Regulation Commission* (Me.) 450 A.2d 475, 482-83 (1982) (restricted timber harvesting upon 550 acres of a 25,000 acre township to protect a deer herd permitted profitable operations and was held constitutional, and severe temporary restrictions upon more than half the acreage of a 2700 acre deeryard were also upheld).

¹⁵¹ The habitat of the snail darter along the lowest stretch of the Little Tennessee River was flooded out after authority to do so was conferred by a surreptitious rider to an appropriations bill that became law; see Plater, *In the Wake of the Snail Darter: An Environmental Law Paradigm and its Ansequences*, 19 *Journal of Law Reform* 805, 808, 813-14 (1986). Afterwards, the darter was found in feeder streams, and the Dept. of the Interior took the darter off of the endangered species list and classified it as a threatened species. *Id.* at 816.

spotted owls of the last great old-growth forests may need the forests to survive. Fortunately, for the owl, the government owns the forests. Protest over regulatory property loss to save these species would have been deafening if they had lived on private land. Withdrawal of public land from use to save these species brought on protests that received national publicity.¹⁵²

In *Tennessee Valley Authority v. Hill*,¹⁵³ the snail darter and the Endangered Species Act halted the commencement of operations for a one hundred million dollar government dam, the Tellico dam in Tennessee.¹⁵⁴ Construction of the dam began in 1967.¹⁵⁵ The Endangered Species Act was enacted in 1973.¹⁵⁶ The darter was put on the endangered species list in 1975.¹⁵⁷ The Supreme Court ruled for the darter.¹⁵⁸

Quite possibly, the risk of extinction of aquatic life from the construction of dams in southern waters was known before work on the Tellico dam began.¹⁵⁹ For the purpose of discussion, however, it will be assumed that the possibility of this risk occurred to nobody beforehand, and that the dam was privately owned. Similarly, it will be assumed that the habitat of the northern spotted owl is a privately-owned forest that was purchased for the harvest value of its standing timber long before there was any known threat to the owl. It will be assumed, in other words, that protective regulation in both cases is a complete surprise that will destroy millions of dollars of investment in private property.

The simplicity and the necessity of the case for just compensation for these losses may seem overwhelming. Besides, a constitutional system that once gave the coal industry a constitutional right to destroy coal communities,¹⁶⁰ and might do so again,¹⁶¹ may not seem a very safe haven for the survival of wildlife that is already near extinction. But simple problems with simple

Zygmunt J. B. Plater, the author of the cited work, is a professor of law at Boston College Law School, and acted as counsel for the citizen plaintiffs who opposed the Tellico Dam. *Id.* at 805. *See also*, *Tenn. Valley Authority v. Hill*, 439 U.S. 153, 155 (1978).

¹⁵² *Id.* The northern spotted owl has also been classified as a threatened species, and the classification might ease the loss of many jobs in the Pacific Northwest. *See* *Detroit Free Press*, June 23, 1990, at 5A, col. 1; *Detroit Free Press*, June 8, 1990, at 11A, col.

¹⁵³ 437 U.S. 153 (1978).

¹⁵⁴ *Id.* at 156, 172.

¹⁵⁵ *Id.* at 157.

¹⁵⁶ *Id.* at 159.

¹⁵⁷ *Id.* at 161.

¹⁵⁸ *Id.* at 169-70, 195.

¹⁵⁹ House committee hearings disclosed the total disappearance of a vast array of mollusks in southern streams as the result of damming, channelization and pollution; *Id.* at 177, n.23.

¹⁶⁰ *See supra* text accompanying notes 78-101.

¹⁶¹ *See supra* text accompanying notes 214-237.

solutions often obscure tragic results. Extreme cases are often extremely difficult to decide. This is especially true when private property or the interests of the police power must absorb a loss for which neither is responsible.

In such situations, the state, which must always play catch-up in enacting regulations, can not possibly foresee what is impossible for private enterprise to foresee, namely, the destruction of a species from private entrepreneurial activity. Unfortunately, the knowledge that private enterprise, itself, needs to avoid loss of a species is not forthcoming until a severe loss of something becomes inevitable. Moreover, the legislature is not likely to mandate a surprise sacrifice of private property that is extremely severe to save a species whose survival is questionable. Therefore, the enactment of protective legislation under these circumstances, if it were to occur, would show with adequate certainty that the value of the protected interest, at least, would approach the value of the property lost from regulation, although the two interests, admittedly, involve different values.¹⁶²

It is submitted that, in these two extraordinary situations, the state should have the power to place the loss upon private investment principal. There are only three places where the loss can fall. They are accumulated, man-made capital, labor or the natural capital stock.

Like the police power, itself, labor or the general taxpayer is usually playing catch-up with the market. Further, the general taxpayer may be almost as insolvent as the government or heavy-laden with debt even if he is financially afloat. Thus, the general taxpayer may not be the best place for a large unforeseeable loss to come to rest, with so many foreseeable losses for him to absorb, while the chant of no new taxes is whispered throughout the land.

The natural capital stock may not be a very good place for the loss either. The needs of the industrial system are constantly diminishing it. Many intelligent persons seem to think that this depletion simply has to stop and that the industrial system has already destroyed too much of the natural endowment.

This appears to be the theme of *T.V.A. v. Hill*.¹⁶³ Parts of Chief Justice Burger's opinion for the Court might persuade anyone of the need for protective

¹⁶² In *Tennessee Valley Authority v. Hill*, 473 U.S. 153, 187 (1978), the Court said that making the utilitarian calculations that would be needed to determine the comparative worth of the endangered snail darter and the endangered government dam was incompatible with the exercise of Article III federal judicial power under the constitution.

¹⁶³ *Id.*

environmental regulation.¹⁶⁴ It is true that the issues before tCourt involved a survival choice between a government dam and a government-protected snail darter and, therefore, did not activate the takings clause. But the case also seems to speak to broader issues. The government is not the only institution that knows how to wreck the environment.

Accumulated capital, then, remains for consideration as the place for a large, unforeseeable, single-shock, survivable loss to fall. Accumulated capital is a very enduring institution. Arguably, it is the greatest survivor of them all. It probably can absorb such a loss with the least amount of suffering all around.

The market, itself, frequently administers large losses to accumulated capital. Devastation in the nation's rust belt and central cities and losses in the savings and loan industry show what the market can do to capital in prosperous times. Moreover, the market constantly replenishes and increases accumulated capital. Therefore, accumulated capital ought to be able to absorb a catastrophic, but survivable loss occasionally. Letting the loss fall upon the capital of the enterprise from which the risk of loss arises may be necessary to preserve the general taxpayer and the natural endowment.

This proposal is obviously shocking. Any alternative proposal, however, may be almost equally shocking. Perhaps, it would be more civil to say what the Supreme Court said when Virginia chose apple orchards over red cedar trees in a situation that required a survival choice.¹⁶⁵ But this civility would leave too much unsaid.

It might also be more soft-spoken to say, as the Supreme Court has said on several occasions, that the state needs a large discretion in allocating the risks of the industrial system.¹⁶⁶ However one prefers to say it, some vital interests occasionally have to be sacrificed to protect other vital interests that are also at risk. The state can do a much better job of making the survival decisions than the marketplace. The free market, itself, has the capacity to deliver unsurpassable shock.

¹⁶⁴ Half of the extinction of mammals within the past two thousand years had occurred during the most recent fifty-year period. *Id.* at 176. Extinction of species threatens a genetic heritage of incalculable value, *Id.* at 177-78. Congress was concerned about the unknown uses that endangered species might have and their unforeseeable place in the chain of life on this planet. *Id.* at 178-79.

¹⁶⁵ See *supra* text accompanying n.38.

¹⁶⁶ *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986) (retroactive increase in employer pension obligations for employers who withdraw from multi-employer pension plans held constitutional); *Usery v. Turner Elkhorn Mining Co.* 428 U.S. 1, 15-16 (1976) (retroactive imposition upon employers in coal industry of obligation to pay disability benefits for pneumoconiosis held constitutional).

The Fairness Of The Fair Return Model Of The Takings Clause

It is easy to make a brief statement about the fairness of this model. The fair return model permits regulation of private property that allows all of the benefits of the modern welfare state. Child labor is gone.¹⁶⁷ The constitutional sweatshop for the employer is also gone.¹⁶⁸ It has been replaced with a legislated minimum wage.¹⁶⁹ State protection of labor unions brought improvements in wages, hours and working conditions.¹⁷⁰ The national government established a social security system and made numerous other benefits and amenities available.

The regulated marketplace provided all of these benefits after it seemed that the free market would withhold them forever. Further, all of this was done with regulation that allowed at least a fair return upon investment. It is possible that the system that provided these benefits also increased the nation's per capita production of millionaires.

Yet the constitutional system that did all of this may now itself be at risk. There may always be a constituency for laissez faire that would like to get what it wants without having to convince the legislative and executive branches of government of the desirability of its program.¹⁷¹ Some spokespersons for laissez faire may now be sitting on the high Court again. A new configuration of judges on the supreme bench auspiciously suggests the restoration of a laissez faire regime of constitutional law. *Nollan v. California Coastal Commission*¹⁷² is only one recent case that shows the direction in which the Court may go.

¹⁶⁷ *United States v. Darby*, 312 U.S. 100, 108, 116-117 (1941) upheld the federal Fair Labor Standards Act of 1938, 29 U.S.C.A. §§ 201, *et. seq.* as an exercise of Congress commerce power and overruled *Hammer v. Dagenhart*, 247 U.S. 251 (1918). Sec. 211 of the act contains child labor provisions.

¹⁶⁸ *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) upheld a minimum wage law for women and overruled *Adkins v. Children's Hospital* 261 U.S. 525 (1923).

¹⁶⁹ *Id.*

¹⁷⁰ *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937) upheld the National Labor Relations Act of 1935.

¹⁷¹ Former Supreme Court Justice Robert H. Jackson said the following about the constitutional struggle over the New Deal: "Life tenure was a device by which the conservatives could thwart a liberal administration if they could outlive it. The alternations of our national mood are such that a cycle of liberal government seldom exceeds eight years, and by living through them the court could go on without decisive liberal infusion. So well has this strategy worked that never in its entire history can the court be said to have for a single hour been representative of anything except the relatively conservative forces of its day." JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 187 (1941).

*Nollan v. California Coastal Commission*¹⁷³ -
Taking The City To The Seashore

The Nollans were married and had been the tenants in a California beach bungalow for a long time.¹⁷⁴ Initially, the bungalow was small and primitive.¹⁷⁵ Eventually, it became decrepit.¹⁷⁶ The city, however, was beginning to come to the beach area near the bungalow, and the Nollans' lease had an option to purchase.¹⁷⁷ The Nollans decided to exercise the option.¹⁷⁸ In keeping with what exercising the option would require and what was taking place in the neighborhood,¹⁷⁹ they wanted to replace the bungalow with a two-story house and an attached two-car garage.¹⁸⁰ Making these improvements would have constituted a five-fold increase in the development of their lot,¹⁸¹ and the Nollans were required to get a permit to make them from the California Coastal Commission.¹⁸²

The beach was public tideland seaward from the mean high tidemark.¹⁸³ The commission was apprehensive that intensive residential development of the beach,¹⁸⁴ including some expansion seaward, would deter the public from walking along the beach. The Nollans' lot was about midway between two public beaches,¹⁸⁵ and the commission wanted to protect public access to them along the seashore.¹⁸⁶ Consequently, the commission insisted upon the dedication of a ten-foot strip of private beachfront property for public access along the beach as a condition for allowing the city to come to the beach.¹⁸⁷

A five-justice Supreme Court majority¹⁸⁸ refused to see the commission's program as a reasonable accommodation of the conflicting needs of adjacent

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 827.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 829-30.

¹⁷⁹ *Id.* at 828.

¹⁸⁰ *Id.* at 856.

¹⁸¹ *Id.*

¹⁸² *Id.* at 828.

¹⁸³ *Id.* at 827.

¹⁸⁴ *Id.* at 828-29, 835-36.

¹⁸⁵ *Id.* at 827.

¹⁸⁶ *Id.* at 828-29.

¹⁸⁷ *Id.* at 828, 853.

¹⁸⁸ *Id.* at 826.
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landowners.¹⁸⁹ Instead, they viewed the dedication requirement as a regulatory landgrab¹⁹⁰ and, therefore, a violation of the takings clause because the state did not pay compensation.¹⁹¹ This ruling must have been frustrating enough for a state agency that has the delicate task of preserving a precious natural resource from an onslaught of overdevelopment upon nearby land. But the supreme Court decided to increase the delicacy of the task.

The Court implied that, apart from the dedication requirement, the commission's restrictive regulations for beachfront development might be out of date and in need of revision.¹⁹² The court seemed to suggest, in other words, that when the city is ready to go to the seashore, what may be needed is a construction of the takings clause that will require appropriate deregulation and let the free market facilitate this development.¹⁹³ A free market that has a constitutional right to take the city to the seashore can take the city anywhere. It can take the city to the suburbs, to the countryside and to special enclaves of charm within urban metropolitan areas.

Taking The City Elsewhere

*Golden v. Planning Board of The Town of Ramapo*¹⁹⁴ allowed a town to delay new residential subdivision for a generation until provision could be made for related public services that may have been only vaguely forthcoming.¹⁹⁵ This long delay of residential development in part to preserve the suburban charm of the town¹⁹⁶ also delayed satisfaction of an urgent need for housing¹⁹⁷ although the eventual urbanization of the town was a foregone conclusion.¹⁹⁸ The precedential value of *Ramapo* seems dubious after *Nollan*. Equally suspect are the cases that hold that a large minimum lot size to preserve the rural

¹⁸⁹ *Id.* at 838-39, n. 6.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 841-42.

¹⁹² The Court suggested that the challenged permit system of the California Coastal Commission may have been too restrictive to accommodate the demand for more intensive beachfront development when it said:

"One would expect that a regime in which this kind of the leveraging of the police power is allowed would produce stringent land-use regulation which the State then waives to accomplish other purposes, leading to lesser realization of the land-use goals purportedly sought to be served than would result from more lenient (but nontradable) development restrictions. Thus, the importance of the purpose underlying the prohibition not only does not *justify* the imposition of unrelated conditions for eliminating the prohibition, but positively militates against the practice." *Id.* at 837-38, n.5 (emphasis in original).

¹⁹³ *Id.*

¹⁹⁴ 30 N.Y.2d 359, 285 N.E.2d 291 (1972).

¹⁹⁵ *Id.* at 372-73, 285 N.E.2d at 303-04.

¹⁹⁶ *Id.* at 365-66, 285 N.E.2d at 294-95.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 371-72, 285 N.E.2d at 302-03.

character of a community is constitutional and raises only legislative issues.¹⁹⁹

The implications of *Nollan* also seem to conflict with *Agins v. City of Tiburon*,²⁰⁰ a case that *Nollan* expressly approved for the proposition that the police power permits land use regulation to create scenic zones.²⁰¹ Tiburon is on San Francisco Bay.²⁰² It has aquatic facilities, a temperate climate and is close to San Francisco.²⁰³ In 1979, it was also relatively uncrowded, having a population of approximately 6,000 persons living on 1,676 acres of land, or 3.6 persons per acre.²⁰⁴ Suburban land values in Tiburon were also the highest in California then.²⁰⁵

All of this suggests that Tiburon might have been one of the world's most charming places to live. The city wanted to keep its charm. It prescribed one acre of land as the minimum lot size for a home.²⁰⁶

This requirement frustrated the plans of a land developer who owned five acres of ridgeland with "magnificent views of San Francisco Bay and the scenic surrounding areas."²⁰⁷ The value of his land was the highest in Tiburon and, therefore, the most valuable suburban land in California.²⁰⁸ The Supreme Court, however, held that the lot size requirement was constitutional on its face, but left open the possibility that it might be unconstitutional as applied.²⁰⁹ Justice Clark of the California Supreme Court had dissented on constitutional grounds,²¹⁰ and his dissent included a protest that the lot size requirement created a special residential enclave for the wealthy.²¹¹

The constitution, of course, would not prevent the California Supreme Court or legislature from nullifying this plan for pleasant living if the plan were to violate state law. Construing the takings clause, however, to forbid the legislative

¹⁹⁹ *Ybarra v. City of The Town Of Los Altos Hills*, 503 F.2d 250, 252, 254 (9th Cir. 1974) (one acre minimum lot size); *Construction Industry Association of Sonoma County v. City of Petaluma* 522 F.2d 897, 908 (9th Cir., 1975), *cert. denied* 424 U.S. 934 (1976).

²⁰⁰ 447 U.S. 255 (1980).

²⁰¹ 483 U.S. at 835.

²⁰² *Agins v. City Of Tiburon*, 157 Cal. Rptr. 372, 373, 598 P.2d 25, 26 (1979).

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ 447 U.S. at 258.

²⁰⁶ *Id.* at 257.

²⁰⁷ *Id.* at 258.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 262-63.

²¹⁰ 157 Cal. Rptr. at 380, 590 P.2d at 32.

²¹¹ *Id.* at 385, 590 P.2d at 35.

process from prescribing the plan might mean that the Tiburons of the nation, probably few in number at best, would disappear. The free market might not let them exist.

Still, a takings clause that would compel the California Coastal Commission to permit intensive development of the California beach areas may subject other special enclaves to the risk of overdevelopment, too. A beachhead anywhere for any purpose seems futile if its possessor has to remain on the beach. It is possible, on the other hand, that *Nollan* will leave unruffled all of the land use law that it threatens to disarrange. Instead, *Nollan* may be a beachhead for the restoration of freedom of contract as a constitutional substantive right.

FREEDOM OF CONTRACT

Restoration of freedom of contract as a constitutional substantive right might appear suspect if the right were to begin its new reign in splendid isolation without any related, supporting constitutional rights. The right has been gone for a long time.²¹² Sudden and inexplicable change in construing the nation's fundamental charter might be more alarming than a surprise regulation of property rights. The return of constitutional freedom of contract, however, might appear natural if one or two courtiers were already waiting to provide a reception. The commerce clause and the takings clause could send them ahead beforehand.

Recently, in *Garcia v. San Antonio Metropolitan Transit Authority*,²¹³ there was controversy in the Supreme Court over whether application of the federal minimum wage law to state and local government enterprise was an unconstitutional affront to the sovereign dignity of the states.²¹⁴ The validity of the law's application to private employers who were engaged in similar activity was said to be unquestionable.²¹⁵ Moreover, earlier, *National League of Cities v. Usery*²¹⁶ had held in a 5 to 4 decision²¹⁷ that the federal law did offend,²¹⁸ and *Cities* also overruled *Maryland v. Wirtz*,²¹⁹ which eight years earlier had held that the federal law gave no offense.²²⁰ Then, nine years after

²¹² *Ferguson v. Skrupa*, 372 U.S. 726, 728-31 (1963). See *supra* note 140.

²¹³ 469 U.S. 528 (1985), *reh den*, 471 U.S. 1049 (1985).

²¹⁴ The constitutional issue was whether the commerce power of congress allowed it to regulate the wages and hours of state and local government employees whose employment involved traditional, sovereign, governmental functions; *Id.* at 530, 537-38.

²¹⁵ *Id.* at 537.

²¹⁶ 426 U.S. 833 (1976) (*overruled by Garcia*, 469 U.S. 528 (1985)).

²¹⁷ *Id.* at 856, 880.

²¹⁸ *Id.* at 845, 851-52.

²¹⁹ 392 U.S. 183 (1968) (*overruled by Usery*, 426 U.S. 833 (1976)). See 426 U.S. at 855.

²²⁰ 392 U.S. at 198-99.

Cities, *Garcia* held in a 5 to 4 decision²²¹ that the federal law did not offend,²²² and *Garcia* repaired the error of *Cities* by overruling it.²²³

Justice Rehnquist, however, who had written for the Court in *Cities*,²²⁴ confidently predicted a constitutional comeback for *Cities* in his brief dissenting opinion in *Garcia*.²²⁵ The restoration of *Cities* would give state and local government employers the constitutional freedom of contract to operate a sweatshop as a sovereign prerogative rather than a fundamental right under the due process clause. It would also make the return of freedom of contract for private employers seem natural. Constitutional freedom of contract of this dimension would also make the marketplace rather than the legislature the regulator of wages.

The takings clause can also help to provide some company for a constitutional freedom of contract in the private sector. *Pennsylvania Coal Company v. Mahon*,²²⁶ essentially, was a freedom of contract case.²²⁷ In *Mahon*, all of the arrangements for coal mining that destroyed the communities in Pennsylvania's anthracite region were contractual.²²⁸ The takings clause protected these contractual arrangements because they were property.²²⁹ Moreover, in *Keystone Bituminous Coal Association v. De Benedictis*,²³⁰ the four dissenting justices did not want *Keystone* to overrule *Mahon* in effect or to modify it in any way.²³¹ Chief Justice Rehnquist wrote the dissenting opinion in *Keystone*.²³² Although he did not predict a constitutional comeback for *Mahon*, its chance for such a comeback is as good as the one for *Cities*.

Mahon also indirectly said that ordinary peacetime rent control violates the takings clause.²³³ Chief Justice Rehnquist has indicated that he shares this

²²¹ 469 U.S. at 557.

²²² *Id.* at 531, 556-57.

²²³ *Id.*

²²⁴ 426 U.S. at 835.

²²⁵ 469 U.S. at 579-80.

²²⁶ 260 U.S. 393 (1922).

²²⁷ *Id.* at 413-15.

²²⁸ *Id.*

²²⁹ *Id.* at 415.

²³⁰ 480 U.S. 470 (1987).

²³¹ *Id.* at 507-09.

²³² *Id.* at 507.

²³³ 260 U.S. at 416. See text accompanying notes 126-27.

opinion.²³⁴ Justice Scalia and Justice O'Connor clearly share this opinion, and they said so recently, in *Pennell v. City of San Jose*,²³⁵ which involved a takings clause challenge to provisions for rent relief for hardship tenants in a rent control ordinance.²³⁶ The Supreme Court, however, decided to put on hold the question of whether rent control in ordinary peacetime conditions is compatible with the takings clause by dismissing the case for its failure to raise a concrete controversy about this issue.²³⁷ A constitution that made the marketplace the only ordinary regulator of rents and wages would eventually give it exclusive power over almost all prices, too.

Freedom of contract can aspire to constitutional right status again even through this right lacks specific textual support in the provisions of the Constitution. The right to marry and to have children also lacks such specific textual support. In *Michael H. v. Gerald D.*,²³⁸ a four-justice plurality opinion²³⁹ said that this right is a constitutional substantive right that is secured by the due process clause because the judgment of time has approved the right as one that is essential.²⁴⁰ But parental rights for the father of a child whose mother is married to and living with another man when the child is conceived and born are not fundamental, according to this four-justice opinion. The reason is that time has condemned parental rights for such a father.²⁴¹

Recognized essentiality over time can do for the right to contract what it can do for the right to marry and to have children. Arguably, the right to contract is as essential as the right to marry. Everyone has the right to contract except persons who lack the capacity to manage their own affairs. All that freedom of contract lacks at the moment is a Supreme Court declaration of its fundamental

²³⁴ Justice Rehnquist dissented from the summary disposition of the appeal in *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875, 878 (1983) for lack of a substantial federal question. The Court left intact a rent control ordinance that prohibited a landlord from demolishing a six-unit apartment building in which only one unit was occupied. *Id.* at 875. Justice Rehnquist said, however, that the constitutionality of ordinary peacetime rent control was an open question under *Block v. Hirsh*, 256 U.S. 135 (1921) and that the challenged ordinance also failed to compensate the landowner for the loss of control of his property. *Id.* at 878. Further, dissenting in *Keystone Bituminous Coal Association v. De Benedictis*, 480 U.S. 470 506, 508, Chief Justice Rehnquist approved *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) where the Court indicated that ordinary peacetime rent control went beyond the verge of the law. *Id.* at 416. See *supra* text accompanying n. 130, n.142.

²³⁵ 485 U.S. 1, 15, 20-21 (1988) (dissenting opinion).

²³⁶ *Id.* at 8-9.

²³⁷ *Id.* at 9-10.

²³⁸ 491 U.S. 110 (1989), *reh den*, *Michael H. v. Gerald D.*, 492 U.S. 937 (1989).

²³⁹ Justice Scalia was the author of the opinion which Chief Justice Rehnquist joined in its entirety. Justice O'Connor and Justice Kennedy joined all of the opinion except note 6 thereof which emphasizes identification of the most specific level at which a right traditionally has received protection or has been denied protection in determining whether it is fundamental. *Id.* at 113, 127-28.

²⁴⁰ *Id.* at 123-24.

²⁴¹ *Id.* at 124, 129.

right status and a laissez faire gloss of the kind that Chief Justice Rehnquist, Justice Scalia and Justice O'Connor want to add to the takings clause.

Justice Kennedy did not join the Court in time to participate in *Pennell*, the rent control case, or in *Keystone*, which was decided a year earlier.²⁴² He did join the four-judge plurality opinion in *Michael H.*, however.²⁴³ Justice Souter, of course, has not yet had the opportunity to declare himself on the issues that these cases raise. Further, Justice Marshall's successor probably will be sitting on the Court soon with an outlook on constitutional law that, most likely, will be the opposite of the outlook of Justice Marshall.

Thus, laissez faire will soon be silently making its rounds in the Supreme Court amidst a new alignment of conservative judges. Unlike popular support for the New Deal and welfare capitalism, no mass movement supports the return of a constitutional regime of laissez faire. But no mass movement opposes such a regime either. The issue does not even seem to be on the public mind at all.

With no decisive election returns to follow and the attention of the president, congress and the public apparently drawn to other matters, the Supreme Court may be tempted to lead where only a few may want to go. The court may soon try its hand at governing some of the nation's problems. Like some members of the executive and legislative branches of the federal government, they may see the modern regulatory welfare state as the cause of the nation's problems and the marketplace as the cure.

In any event, the Supreme Court definitely has constitutional laissez faire on its mind. The opportunity for its return may soon be there, and opportunity that is not seized can quickly vanish, even when appearances suggest that it may be long-lasting. The return of constitutional laissez faire would almost certainly assure it a long stay, even though it would put the government in an economic straightjacket and might set off the people and the Supreme Court in opposite directions. History could repeat itself again, of course, even in the Supreme Court, and make laissez faire go away once more. But in the Supreme Court, the process obviously requires a much longer time.

Moreover, the Supreme Court does not have a constitutional mandate to provide a permanent solution for the economic and fiscal problems of the nation. The Court is not to blame for these problems. It cannot possibly solve them, and

²⁴² Justice Kennedy took his oath of office and assumed Office on February 18, 1988. 484 U.S. iv. *Pennell v. City of San Jose*, 488 U.S. 1 (1988) was argued on November 10, 1987 and decided on February 24, 1988. Justice Kennedy took no part in the consideration decision of the case. *Id.* 15. *Keystone Bituminous Coal Association v. De Benedictis*, 480 U.S. 470 (1987) was decided on March 9, 1987.

the issue of modest, ameliorative distribution of the nation's wealth should be none of the Court's business.

The legislative process can distribute wealth downward, upward or not at all, as recent and past history plainly shows. A fair return for capital that makes it rich and provides the people with more benefits than is possible with a laissez faire system cannot justly be called an exercise in grand larceny. A Supreme Court that took these welfare benefits away from the people would never be able to persuade the people that it was merely returning them to their true owners or that the constitution required such a massive give-back. The Supreme Court, itself, might end up looking like the thief. The dismantling of the modern welfare state does not belong on the Court's agenda.